No. 95-8836 (6)

In The

Supreme Court of the United States

October Term, 1995

ELLIS WAYNE FELKER,

Petitioner,

v.

TONY TURPIN, Warden Georgia Diagnostic and Classification Center,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENT

SUSAN V. BOLEYN
Senior Assistant
Attorney General
Counsel of Record for Respondent

MICHAEL J. BOWERS
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

PAULA K. SMITH
Senior Assistant Attorney General

PAIGE REESE WHITAKER
Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

CUCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1.

Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2254(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

2.

Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.

3.

Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

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STATEMENT OF THE CASE

Petitioner, Ellis Wayne Felker, was indicted on May 17, 1982, in the Superior Court of Houston County, Georgia, for the murder, rape, aggravated sodomy, false imprisonment and robbery of Evelyn Joy Ludlam. Following the close of the evidence at the guilt-innocence phase of trial, a directed verdict was granted as to the robbery charge. Petitioner was found guilty of the remaining charges and received a life sentence for rape, a twenty-year sentence for aggravated sodomy, to be served consecutively to the rape sentence, and a ten-year sentence for the offense of false imprisonment, to run concurrently with the sentence imposed for rape. At the sentencing phase, the jury found the existence of two statutory aggravating circumstances, i.e., that the offense of murder was committed while the offender was engaged in another capital felony, to wit: rape; and that the offense was outrageously or wantonly, vile, horrible or inhuman in that it involved torture or depravity of mind. *See* O.C.G.A. § 17-10-30(b)(2) and (b)(7). Petitioner's amended motion for new trial was denied on July 20, 1983.

Petitioner appealed to the Supreme Court of Georgia which court affirmed his convictions and sentences in *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984). Petitioner's motion for rehearing was denied on March 29, 1984. Petitioner's petition for a writ of certiorari filed in this Court was denied on October 1, 1984, and rehearing was denied on November 26, 1984. *Felker v. Georgia*, 469 U.S. 873, *reh'g denied*, 469 U.S. 1067 (1984).

Petitioner then filed a state habeas corpus petition in the Superior Court of Butts County, Georgia on December 17, 1984. Proceedings were held on March 25, 1985, March 3, 1986, March 30, 1987 and July 16, 1990. The state habeas corpus court denied Petitioner relief on August 9, 1990. Petitioner's application for a certificate of probable cause to appeal from the denial of state habeas corpus relief was denied by the Supreme Court of Georgia on September 3, 1991. Petitioner then filed a petition for a writ of certiorari in this Court on November 1, 1991, which was denied on January 21, 1992. *Felker v. Zant*, 502 U.S. 1064 (1992).

On April 12, 1993, Petitioner served by mail on counsel for Respondent Petitioner's first application for federal habeas corpus relief to be filed in the United States District Court for the Middle District of Georgia. The district court subsequently allowed the application to be filed, and it was stamped filed as of June 2, 1993. On June 9, 1993, the district court entered an order directing the Petitioner to amend his petition within thirty days "to include every alleged possible constitutional error or deprivation entitling petitioner to habeas relief in this court, failing which petitioner will be presumed to have deliberately waived his right to complain of any constitutional errors or deprivations other than those set forth in his habeas petition."

On January 26, 1994, the district court denied Petitioner federal habeas corpus relief. Petitioner filed a notice of appeal on February 23, 1994. The district court granted Petitioner's application for a certificate of probable cause to appeal on February 25, 1994.

Petitioner appealed the denial of federal habeas corpus relief to the United States Court of Appeals for the Eleventh Circuit. Following oral argument, the Circuit Court affirmed the denial of federal habeas corpus relief in *Felker v. Thomas*, 52 F.3d 907 (11th Cir. 1995). On Petitioner's petition for a rehearing and suggestion of rehearing *en banc*, the Eleventh Circuit addressed Petitioner's contentions, but extended the original panel opinion. *Felker v. Thomas*, 62 F.3d 342 (11th Cir. 1995). Petitioner then filed a petition for a writ of certiorari in this Court seeking review of the two opinions of the Eleventh Circuit. Certiorari was denied on February 20, 1996, and Petitioner's petition for rehearing was denied on April 15, 1996.

Petitioner's execution window was scheduled for May 2, 1996, through May 9, 1996. On April 29, 1996, Petitioner filed a motion for access to conduct a mental health evaluation of Petitioner and a second petition for state habeas corpus relief in the Superior Court of Butts County. Respondent filed a motion to dismiss this petition as successive under O.C.G.A. § 9-14-51 and for failure to state a claim as to certain issues.

On April 30, 1996, Petitioner filed an amended petition for a writ of habeas corpus, and Respondent filed an amended motion to dismiss the petition as successive under state law on May 1, 1996, prior to the hearing previously scheduled by the court in connection with Respondent's motion to dismiss. Following the hearing conducted on May 1, 1996, the state habeas corpus court found the challenge to the charge under *Cage v. Louisiana*, 498 U.S. 39 (1990), to be without merit and the remaining issues to be successive and subject to dismissal under

Georgia's successive petition rule. On May 2, 1996, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal and denied Petitioner's motion for stay of execution.

On May 1, 1996, the State Board of Pardons and Paroles denied Petitioner's application for stay of execution and commutation of death sentence.

On May 1, 1996, Petitioner filed an "Application for Permission to File a Second Habeas Corpus Petition in the District Court and for Stay of Execution" in the United States Court of Appeals for the Eleventh Circuit. The Respondent Warden in that action lodged a response on May 1, 1996. On May 2, 1996, the Eleventh Circuit Court of Appeals denied Petitioner's application for permission to file a second petition for federal habeas corpus relief pursuant to Section 106(b)(3)(A) [28 U.S.C. § 2244(b)(3)(A)] of the new habeas corpus statute contained in Title I of the Antiterrorism and Effective Death Penalty Act of 1996; found Petitioner had not shown that he would be entitled to relief on his challenges to the constitutionality of the new Act because "he would not be entitled to any relief even under pre-Act law," *Felker v. Turpin*, No. 96-1077 (11th Cir. May 2, 1996); and denied Petitioner's motion for a stay of execution.

While Petitioner's application was pending in the Eleventh Circuit Court of Appeals, Petitioner filed a"Petition for Writ of Habeas Corpus, for Appellate or Certiorari Review of the Decision of the United States Circuit Court for the Eleventh Circuit, and for Stay of Execution." On May 3, 1996, this Court granted certiorari and a stay of execution and posed three questions to be

addressed by the parties. *Felker v. Turpin*, 64 U.S.L.W. 3740 (May 3, 1996).

SUMMARY OF THE ARGUMENT

The only way to preserve the integrity of the writ of habeas corpus is to protect it from abuse. With the passage of the Act of 1996, Congress has enacted legislation to deal with the ever-increasing number of petitions, new and creative forms of abuse and eleventh hour attempts to delay executions. This Court has expressed the same concerns in its recent federal habeas corpus decisions.

Section 106(b)(3)(E) is not an unconstitutional restriction on the jurisdiction of this Court. The Constitution permits Congress to restrict the jurisdiction of this Court in habeas corpus mattters and this Court has recognized this authority. This Court has specifically recognized and applied restrictions previously imposed by Congress on successive habeas corpus petitions.

The new Act is not inconsistent with the traditional approach this Court has taken concerning the parameters of 28 U.S.C. § 2241. The provisions of the new Act concerning initial applications for the writ are applicable to original applications filed under § 2241. This Court should not undermine its own efforts nor those of Congress to preserve the integrity of the writ by revitalizing an "anachronistic" writ of rare and extraordinary application.

Petitioner would not have been entitled to relief under the old law. Therefore, the Act's restrictions could

have no unconstitutional effect on him. On a broader scale, needed restrictions on successive petitions are not equivalent to a suspension of the writ.

ARGUMENT

I. INTERSECTION OF CONCERNS OF THIS COURT AND CONGRESS

Congress' thirty year silence has come to an end. No longer must this Court attempt to divine congressional intent to deal with ever-increasing numbers of petitions, new and creative forms of abuse, and eleventh hour attempts to delay executions.[1] The Antiterrorism and Effective Death Penalty Act of 1996 (the Act), recently passed by Congress and signed into law by the President

[1] Average time from crime to execution in Powell Committee case study was 106 months; analysis of cases from those states (Alabama, Florida, Georgia, Mississippi, and Texas) shows that 80% of the time spent in collateral litigation in death penalty cases occurs outside of state collateral proceedings. Ad Hoc Comm. on Fed. Habeas Corpus in Cap. Cases, Jud. Conf. of the U.S., Committee Report and Proposal, p. 8 (1989); "for the 10 year period from 1977-1987, the average elapsed time from the imposition of a capital sentence to execution was 77 months," U.S. Department of Justice, Bureau of Justice Statistics, Capital Punishment 1987, p. 9 (table 10) (1988) *quoted in Teague v. Lane*, 489 U.S. 288, 314, n.2 (1989). In 1985, state prisoners filed 8,534 federal habeas corpus petitions; in 1986, 9,045 such petitions were filed; by 1988, the number of such petitions was 9,880. Donald E. Wilkes, Jr., *Federal and State Post-conviction Remedies and Relief*, 522-523 (1992) (table cataloging data obtained from the Administrative Office of the United States Courts).

on April 24, 1996, is the culmination of a ten year legislative effort to address and resolve well-recognized problems within our system of federal habeas corpus review.[2] With the passage of this Act, Congress' concern with federal habeas corpus review has intersected with the concerns of this Court.

Paralleling Congress' recent legislative efforts to overhaul habeas corpus procedures, this Court has endeavored to bring into focus the appropriate scope of federal habeas corpus review, to simplify and clarify the procedures governing the writ, and to provide guidance to the lower courts. *See, e.g., Lonchar v. Thomas*, ___ U.S. ___, 116 S.Ct. 1293 (1996); *McCleskey v. Zant*, 499 U.S. 467 (1991). *See also Schlup v. Delo*, ___ U.S. ___, 115 S.Ct. 851 (1995); *Herrera v. Collins*, 506 U.S. ___ (1993); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514 (1992); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Teague v. Lane*, 489 U.S. 288 (1989); *Kuhlmann v. Wilson*, 477 U.S. 546 (1986); *Barefoot v. Estelle*, 463 U.S. 880 (1983). For example, making reference to the history of

[2] Report 104-23, 104th Cong. 1st Sess., Effective Death Penalty Act of 1995, February 8, 1995; 137 Cong. Rec. S.3199-201 (Mar. 13, 1991); S. HRG. 101-1253, Hearings Before the Committee on the Judiciary, United States Senate, 101st Cong., 1st and 2nd Sess. on S.88, S.1757, and S.1760, November 1989 and February 1990, Serial No. J-101-49; S. Rep. No. 226, 98th Cong. 1st Sess. (1983) (earliest version of the act); H.R. 5269, 101st Cong., 2d Sess. (1990) (attempting to amend 28 U.S.C. § 2254(b)), *cited in McCleskey v. Zant*, 499 U.S. 467, 516 (1991); *Lonchar v. Thomas*, ___ U.S. ___, 116 S.Ct. 1293, 1303-1304 (1996) (listing bills introduced during the last ten years proposing a statute of limitations for federal habeas corpus petitions).

federal habeas corpus jurisprudence, the applicable statutes, and the Court's precedent, this Court dealt specifically with the handling of subsequent applications for federal habeas corpus relief in such cases as *Sawyer v. Whitley*, *McCleskey v. Zant*, and *Kuhlmann v. Wilson*.

It is readily apparent that specific components from this Court's decisions have been incorporated by Congress in the new Act. This fact, that the new Act is reflective of this Court's recent federal habeas corpus jurisprudence, was to be expected. As this Court noted in *McCleskey v. Zant*, its decision in *Price v. Johnston*, 334 U.S. 266 (1948), prompted congressional action with the enactment of 28 U.S.C. § 2244, a statute whose interpretation is involved in the instant case. *McCleskey v. Zant*, 499 U.S. at 483. Similarly, the Court in *McCleskey v. Zant* acknowledged that the enactment of 28 U.S.C. § 2244(b) and Rule 9 of the Rules Governing Section 2254 Cases was commonly accepted as having been a response to this Court's decision in *Sanders v. United States*, 373 U.S. 1 (1962). *McCleskey v. Zant*, 499 U.S. at 485. *See also Kuhlmann v. Wilson*, 477 U.S. at 469.

Just as *Price* and *Sanders* previewed the legislation ultimately enacted, Respondent submits that this Court's decisions in *Barefoot v. Estelle* and *McCleskey v. Zant* foreshadowed the 1996 Act as it relates to successive federal habeas corpus actions, particularly in the context of capital cases.

As this Court has repeatedly recognized, it should not exceed the congressional parameters of its federal habeas corpus jurisdiction. Most recently, in *Lonchar v. Thomas*, this Court recognized that there was considerable

debate about whether Rule 9(a) of the Rules Governing Section 2254 Proceedings "properly balances the relevant competing interests" but concluded that, "to debate the present rule's effectiveness is to affirm, not to deny, its applicability." *Id.*, 116 S.Ct. at 1301. Significantly, this Court in *Lonchar* noted that the congressional debate over the efficacy of the rule "reveals the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rule-making process." *Id.* The Act now before this Court for review is, after years of legislative efforts, the result of just such a process.

Respondent submits that the Act is simply the next logical step foreshadowed by this Court's precedent, as well as previous legislative attempts at redefining federal habeas corpus review. The Act addresses the continued need for a viable system of habeas corpus review while attempting to streamline certain of the procedural mechanisms contained in the present system. Additionally, the Act alleviates the unnecessarily burdensome caseloads while allocating legitimate cases and last minute requests for the review of successive petitions so that they may be most effectively resolved within the system.

II. THE SPECIFIED CODE SECTION OF THE 1996 ACT IS NOT AN UNCONSTITUTIONAL RESTRICTION OF THE JURISDICTION OF THIS COURT.

The first question posed by this Court to the parties is "Whether Title I of the Anti-Terrorism and Effective

Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court."

Section 106 is entitled "Limits on Second or Successive Applications" and reads, in pertinent part, as follows:

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Section 106(b)(3), 28 U.S.C § 2244(b)(3).

Just as Congress in 1908 enacted the requirement in connection with initial applications for the writ that a petitioner make a showing in an application for a certificate of probable cause to appeal before being granted authority to proceed, Congress has now incorporated a similar concept requiring a petitioner make an initial showing before being allowed to file a successive petition. In fact, this Court in *Barefoot v. Estelle* noted that the certificate of probable cause requirement had specifically been enacted to deal with the problem of "the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process." *Barefoot*, 463 U.S. at 892, n.3. Thus, the concept of requiring a threshold showing is not novel, nor is the utilization of a threshold showing to attempt to ferret out frivolous petitions filed on the eve of execution.

Under *Sanders v. United States*, and subsequently under Rule 9(b) of the Rules Governing Section 2254 Proceedings, it was formerly the obligation of a federal district court to initially determine whether a petitioner was entitled to pursue a second or subsequent application for federal habeas corpus relief. Congress has now delegated this responsibility to the circuit courts. The present discretion accorded to the federal circuit courts is similar to that discretion contained in the previous 28 U.S.C. § 2244(b) which provided that "a district court may entertain" a second application for federal habeas corpus relief but that these applications "need not be entertained." Rule 9(b) of the Rules Governing Section 2254 Proceedings provided a list of circumstances under

which second or subsequent applications "may be dismissed." Circuit courts were already reviewing district court judgments as to whether second or subsequent petitions constituted an abuse of the writ, in the course of appellate review. They are now being required to perform this evaluation as an initial matter in connection with subsequent applications.

Under the prior law, once abuse was pled, a petitioner was required to justify proceeding on a second or subsequent proceeding. Under the 1996 Act, Congress made a purely procedural change that this justification be made not to the district court, but to the circuit courts.

The decision to vest discretion with the circuit courts, by virtue of these procedural changes, as to whether to allow a second or subsequent federal habeas corpus petition to be filed is reasonable. In *Sanders*, this Court found it appropriate to vest discretion in the federal district court to make such a decision, commenting that the resolution of successive applications should be "addressed to the sound discretion of the federal trial judges." *Sanders*, 373 U.S. at 18. The Court concluded, "We are confident that this power will be soundly applied." *Id.* at 19. In *Delo v. Stokes*, 495 U.S. 320, 325 (1990), the Court also expressed confidence in the lower courts' abilities to dispose of successive writs of habeas corpus and concluded that, "[t]he Court of Appeals similarly is due considerable deference." *See, e.g., Straight v. Wainwright*, 476 U.S. 1132 (1986) (finding no basis for concluding that the district court abused its discretion); *Kemp v. Smith*, 463 U.S. 1344, 1345 (1983) (denying Georgia's application to vacate a last minute stay of execution ordered by the Court of Appeals). Therefore, the shift from the district

courts to the circuit courts is not at odds with this Court's expressed confidence in the decision-making abilities of the lower federal courts nor their experience in making these decisions.

In addition to providing that the circuit courts now determine whether a federal district court should entertain a successive application for federal habeas corpus relief, the Act also provides that the decision of the circuit court, in this case the Eleventh Circuit, denying an authorization to file a subsequent application shall not be the subject of a petition for rehearing or a petition for a writ of certiorari to this Court. Section 106(b)(3)(E); 28 U.S.C. § 2244(b)(3)(E). This statutory scheme is a workable solution to what has become a burdensome caseload for this Court, especially involving last minute applications for federal habeas corpus relief filed by capital litigants. *See Sawyer v. Whitley*, 112 S.Ct. at 2520, n.7. Allowing the circuit courts to winnow out frivolous successive cases frees this Court to focus on cases involving fundamental constitutional principles of widespread application. Moreover, Congress' action to restrict the availability of successive petitions comports with important constitutional principles enunciated by this Court.

The jurisdiction of this Court was established in Article III, Section 2, Clause 2 of the United States Constitution, which reads:

> In all Cases Affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact,

with such exceptions, and under such Regulations as the Congress shall make.

This Court has interpreted "appellate jurisdiction" as used in this constitutional provision to include habeas corpus actions. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807) (finding habeas corpus action before it was an exercise of its appellate jurisdiction, as Court was reviewing decision which had resulted in imprisonment of the petitioner); *Ex parte Siebold*, 100 U.S. 371, 374-375 (1880) (finding that Court's exercising of its habeas corpus jurisdiction is an exercise of its appellate jurisdiction in all cases not falling within its original jurisdiction and where exceptions to appellate jurisdiction have not been made). *See generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), this Court discussed the source of its appellate jurisdiction and concluded that "the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.' " *Ex parte McCardle*, 74 U.S. at 512-513. In *Ex parte McCardle*, this Court reviewed Congress' decision to repeal this Court's appellate review in habeas corpus cases, and this Court found itself to be bound by this congressional action.

By way of further example, in 1868, Congress amended the Habeas Corpus Act of 1867, which is generally recognized by commentators to have extended the writ of habeas corpus to state prisoners, to repeal the exercise by the Supreme Court of any jurisdiction on

appeals from the circuit courts. March 27, 1868, ch. 34, § 2, 15 Stat. 44. Thus Congress' removal of appellate jurisdiction from this Court, as in the 1996 Act for the denial of authorization to file second or successive applications, Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E) is not unprecedented.

Additionally, this Court enforces a jurisdictional time limitation on its certiorari jurisdiction in civil cases established by Congress in 28 U.S.C. § 2101(c). *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). *See also Williams v. Kemp*, 489 U.S. 1094 (1989) (dismissing petition for a writ of certiorari for want of jurisdiction). Moreover, this Court's own Rules state: "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons" Supreme Court Rule 10.

By declaring that as to decisions whether to permit filing of successive applications for federal habeas corpus relief, no review of that decision in the circuit courts or this Court shall be had, Congress has delineated a specific exception to the Court's jurisdiction, which this Court has acknowledged is within the power of Congress under the Constitution. Further, this specific exception is narrow, as it withholds jurisdiction only to review the determination whether authorization to file a successive petition is warranted. In successive applications where leave to file is authorized by the circuit courts, regular appellate proceedings will take place, including any appeal to the court of appeals, rehearing in the court of appeals, and certiorari petitions filed in this Court.

In fact, this Court has validated as constitutional a statutory scheme which eliminated federal habeas corpus actions in their entirety. *See Swain v. Pressley*, 430 U.S. 372 (1977). The statutory scheme reviewed by this Court in *Swain* and found to be constitutional, also contained a provision specifically prohibiting the filing of successive petitions. D.C. Code Ann. § 23-110(e), *cited in Swain*, 437 U.S. at 374, n.2.

In the Act of 1996, Congress left intact certiorari jurisdiction as to direct appeal from the state criminal proceeding, the state habeas corpus proceeding and the initial federal habeas corpus proceedings. *See* 28 U.S.C. § 1254(1). Similarly, this Court noted in *Swain*, under the District Court statutory scheme accepted in that case, an individual tried under the District Court statute would have two opportunities to seek review before this Court: "First, after affirmance of his conviction by the District of Columbia Court of Appeals, and second, after a judgment of that court resulting in the denial of relief under § 23-110." *Id.* at 382, n.16. Petitioner has already sought this Court's review by certiorari on three prior occasions and still retains the opportunity to file a fourth petition for certiorari from the most recent decision denying him state habeas corpus relief. Under the Act of 1996, Petitioner merely lacks the ability to seek a writ of certiorari to review an order of the Eleventh Circuit Court of Appeals finding no basis upon which to authorize the filing of a second petition.

The only way to preserve the integrity of the writ is to protect it from abuse. The deluge of last minute frivolous litigation impairs this Court's ability to function by

making it impossible for the Court to find those "exceptional cases" containing meritorious claims. Congress' de minimis restriction of the ability to seek certiorari in a frivolous successive petition is not violative of the Constitution.

III. EXTRAORDINARY RELIEF SHOULD REMAIN EXTRAORDINARY.

In question two, this Court asks "Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241." The answer to this question depends on the extent to which the Court continues to adhere to the traditional parameters of 28 U.S.C. § 2241 and its willingness to effectuate the clear congressional intent of the new Act.

The pertinent portions of 28 U.S.C. § 2241 read as follows:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions. . . .
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

This Court's own rules provide the following guidance:

> A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

Supreme Court Rule 20.4(a).

The direct writ has historically been treated as "extraordinary," "limited," "sparingly used," and "rarely granted." Supreme Court Rule 20.4(a); D. Oakes, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 154 n.4. Rarely has this Court even allowed such writs to proceed. Instead, this Court has customarily transferred such writs to the appropriate district court, as suggested in 28 U.S.C. § 2241(b). Even more rarely has this Court granted relief under this statute. "This Court does not, absent exceptional circumstances, exercise its jurisdiction to issue writs of habeas corpus

when an adequate remedy may be had in a lower court." *Dixon v. Thompson*, 429 U.S. 1080 (1977) (citing *Ex parte Abernathy*, 320 U.S. 219 (1943) and *Ex parte Tracy*, 249 U.S. 551 (1919)). In fact, it appears that this Court has not granted relief on a petition for habeas corpus filed directly with the Court since 1925. *Oakes*, 1962 Sup. Ct. Rev. at 154 n.4 (citing *Ex parte Grossman*, 267 U.S. 87 (1925)).

Sections 101-105 of the 1996 Act governing initial habeas corpus actions are clearly intended to apply to any initial (as opposed to successive) application for the writ, regardless of where the application is filed, even though there is no mention of 28 U.S.C. § 2241 in the Act. By the same token, if this Court were to accept such a direct writ for filing but decide, as the Court customarily does under 28 U.S.C. § 2241(b) that the application should be transferred to the federal district court, then the action would also be governed by Sections 101-105 of the new Act.

Ever mindful of this Court's case or controversy requirement, Respondent does not attempt to address any additional impact of the other portions of the new Act relating to initial applications for the writ on applications filed pursuant to 28 U.S.C. § 2241, as Petitioner did not file his first application pursuant to the new Act, but rather sought authorization to file his second petition under the new Act's provisions. *See* United States Constitution, Art. III, § 2. Instead, Respondent will address the impact of the new Act on 28 U.S.C. § 2241 cases in the context of successive applications.

In this regard, Congress has determined as a policy matter that there should be changes in how successive applications are handled in order to curb abuses of the writ. One change made by Congress is the authorization to file provision of Section 106, 28 U.S.C. § 2244 (hereinafter referred to as ATF), allowing frivolous petitions to be culled and conserving the judicial energies and resources of this Court and the federal district courts. There is no corresponding ATF provision for direct writs under § 2241. Therefore, if this Court permits successive petitioners to file direct writs rather than proceeding under the ATF procedure in the new Act, there results a circumvention of the new statutory scheme so as to nullify its provisions. To allow such circumvention would have the practical effect of increasing this Court's workload by encouraging successive petitioners to file direct writs. This was obviously not Congress' intention.

If this Court permitted the new successive petition provisions to be circumvented in contravention of Congress' intent by allowing petitioners to file original applications in this Court without first going through the authorization to file procedure (hereinafter referred to as ATF), this would nullify the new provisions. A petitioner would have every incentive to bypass the ATF procedure of the new Act and file a successive petition directly in this Court.

There is a particular incentive in the context of capital cases to forum shop, for what this Court has termed "obvious reasons." *Spenkelink v. Wainwright*, 442 U.S. 901, 906 (1979). Tolerating the use of the direct writ in the successive petition context would permit petitioners to

engage in the type of "forum shopping" of which this Court disapproved in *Spenkelink*. *Id*.

This Court should not permit successive petitioners to use this Court as a "fallback" when they have already litigated their claims in federal collateral proceedings but are simply unsatisfied with the results. This would transform the direct writ into yet another appeal to this Court from the denial of relief by a federal court in the first instance.

It would be an anomaly for Congress to create an Act partially intended to decrease the workload of this Court and expedite the consideration of successive petitions while, simultaneously, this Court revitalizes a writ which has been termed an "anachronism"[3] so as to virtually guarantee a never ending flood of petitions and institutionalize delay. Such an anomaly would put this Court at cross-purposes with Congress.

Policy concerns counsel even more strongly against allowing the extraordinary "original" writ to be used in an eleventh hour attempt to obtain a stay of execution. Neither the Court nor Congress would wish to exacerbate last minute capital litigation by institutionalizing another avenue for delay. If capital litigants perceive that this option is available by means of this Court's construction of the Act of 1996, it is beyond dispute that all capital litigants will avail themselves of this opportunity.

It is possible for the new Act and 28 U.S.C. § 2241 to peacefully coexist in light of the extraordinary nature of

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[3] D. Oakes, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 206.

the 28 U.S.C. § 2241 writ, as interpreted in such cases as *Dixon v. Thompson*. As long as this Court continues to adhere to its customary view of the parameters of 28 U.S.C. § 2241, to use its authority sparingly, and to respect the role and exercise of discretion of the lower courts, as Congress intended in enacting the new provisions, no conflict will arise.

Therefore, Title I of the Act applies to initial, direct petitions for writs of habeas corpus, whether this Court transfers the petition to the district court or retains jurisdiction. This Court should not apply the Act to successive, direct petitions to the extent it would expand this Court's historical, restrictive view of direct writs to avoid conflicting with congressional intent as reflected in the new statutory scheme.

IV. THE SUSPENSION CLAUSE DOES NOT REQUIRE PERPETUAL REVIEW

Finally, this Court has posed the question "Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution." This provision of the Constitution reads as follows:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

This Court phrased its question specifically in terms of suspension of the writ "in this case."[4] In considering Petitioner's application for authorization to file a second federal habeas corpus petition, the Eleventh Circuit Court of Appeals addressed Petitioner's challenge to the constitutionality of the Act as applied to him. The Eleventh Circuit concluded that there was no unconstitutional impact upon Petitioner due to the passage of the Act by finding that Petitioner had shown a complete lack of entitlement to proceed under the old or new law. The Eleventh Circuit ruled as follows:

> [W]e choose to analyze this claim not in the abstract, but instead in terms of whether the Act makes any difference insofar as a second or successive petition raising the claims Felker wants to litigate is concerned. (Citations omitted). If Felker is barred from litigating the claims he presents under pre-existing law, then the Act's restrictions can have no unconstitutional effect on him. (Citations omitted). Stated somewhat differently, if under pre-existing law Felker's claims do not present substantial grounds upon which relief might be granted, then his claim that the Act unconstitutionally restricts his presentation of such claims does not present substantial grounds for relief, either.

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[4] As is obvious to this Court, the provisions of the new Act dealing with first time federal habeas corpus petitions are inapplicable to Petitioner, as the Act became law only shortly before Petitioner filed his application for authorization to file his second petition.

* * *

III. CONCLUSION

> Felker has failed to show substantial grounds upon which relief might be granted under the new Act. Likewise, he has failed to show substantial grounds upon which relief might be granted insofar as any constitutional issues involving the Act are concerned, because he would not be entitled to any relief even under pre-Act law.

Felker v. Turpin, slip op. at 7-8; 23-24.

The Eleventh Circuit appropriately found no set of facts to exist which would require consideration of Petitioner's second application for federal habeas corpus relief under the old or new law and found no "restriction" had been erected by the new Act to the presentation of his claims. Therefore, the writ has not been suspended in Petitioner's case.

Further, as noted by the procedural history, Petitioner had availed himself of his full panoply of direct and collateral appeals prior to attempting to file his second application for federal habeas corpus relief, with the exception of filing a petition for certiorari from his second state habeas corpus petition. Petitioner had pursued his direct appeal rights through the denial of certiorari by this Court. Petitioner had pursued his state habeas corpus rights through the denial of certiorari by this Court. Petitioner had pursued his avenues of relief under the federal habeas corpus statute then in effect by filing an initial federal habeas corpus petition; by appealing the

denial of relief to the Eleventh Circuit; by filing a petition for rehearing and rehearing en banc with the Eleventh Circuit; and by filing a petition for a writ of certiorari and a petition for rehearing in this Court from the denial of habeas corpus relief. Thus, not only has Petitioner had ample opportunity to seek, but he has in fact utilized every opportunity, and sought review of direct and collateral state court judgments and the federal habeas corpus courts' judgments prior to the Act becoming effective.

Even under the prior system of federal habeas corpus review, applicants possessed no "entitlement" to a second federal habeas corpus petition. Whether Petitioner was permitted to litigate new issues in a second or subsequent application rested within the discretion of the federal district court under 28 U.S.C. § 2244(b) and Rule 9(b). Under both the old and the new federal habeas corpus provisions, Petitioner must prove why he should be allowed to litigate a second or subsequent petition. The difference between the old and new provisions is that the showing under the new provisions is made to a three judge panel instead of to a single district court judge.

That first writ which Petitioner had cannot be suspended. That subsequent writ to which Petitioner was not entitled cannot be suspended.

The scope of the writ and applicability of the Suspension Clause at the time of the framing of the Constitution and at the present time is subject to continuing and wide-ranging debate by noted jurists and distinguished scholars alike. *See, e.g., Withrow v. Williams*, ___ U.S. ___, 113 S.Ct. 1745 (1993); *Wright v. West*, ___ U.S. ___, 112 S.Ct. 2482 (1992); *McCleskey v. Zant*, 499 U.S. 467 (1991);

Kuhlmann v. Wilson, 477 U.S. 436 (1986); *Swain v. Pressley*, 430 U.S. 372 (1976); *Fay v. Noia*, 372 U.S. 391 (1963); *Sanders v. United States*, 373 U.S. 1 (1962) (Harlan, J., dissenting); *Brown v. Allen*, 344 U.S. 443 (1953); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079 (1995); *Federal Habeas Corpus Review of State Judgments*, 22 U. Mich. J.L. Ref. 915, 918-20 (1989); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.-C.L. L. Rev. 579 (1982); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963).

While Respondent does not assert that the debate must be resolved in this case to answer this Court's third question, the concurring opinion of Chief Justice Burger in *Swain v. Pressley*, 430 U.S. 372 (1976), persuasively expresses Respondent's view. Chief Justice Burger explained:

> The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted. The scope of the writ during the 17th and 18th centuries has been described as follows: "[O]nce a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 468 (1966).

> Thus, at common law, the writ was available (1) to compel adherence to prescribed procedures in advance of trial; (2) to inquire into the cause of commitment not pursuant to judicial process; and (3) to inquire whether a committing court had proper jurisdiction. The writ in 1789 was not considered "a means by which one court of general jurisdiction exercises post-conviction review over the judgment of another court of like authority." *Id.*, at 451.

Id. at 384-5. *See also* Ad Hoc Comm. on Fed. Habeas Corpus in Cap. Cases, Jud. Conf. of the U.S., Committee Report and Proposal, p. 4 n.2 (1989) ("Contrary to what may be assumed, the Constitution does not provide for federal habeas corpus review of state court decisions. The writ of habeas corpus available to state prisoners is not that mentioned in the Constitution. It has evolved from a statute enacted by Congress in 1867, now codified at 28 U.S.C. § 2254."). Therefore, applying this view, the successive habeas corpus provision of the Act would not violate the Suspension Clause.

The problematic question of what the Framers intended by the inclusion of the Suspension Clause in the Constitution and the corresponding significance of the Judiciary Act of 1789 need not be resolved in the instant case. The reason the Court does not need to grapple with the broader question is because the law is well-settled that restrictions on successive petitions are clearly not only permissible but imminently necessary. As this Court expressed 34 years ago, "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral

proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18. Inherent in this oft-quoted observation[5] is the Court's recognition that restrictions in the area of successive petitions are not the legal equivalent of a suspension of the writ. If the "traditions" of habeas corpus do not require that "piecemeal litigation" be tolerated, then restrictions on such litigation are authorized and indeed necessary to preserve the writ's integrity. Further, this Court's tolerance of and adherence to statutory restrictions on successive habeas corpus petitions as contained in 28 U.S.C. § 2244(b) and Rule 9(b) demonstrates that this Court has not viewed these congressional restrictions as a suspension of the writ. *See Schlup v. Delo; Sawyer v. Whitley; McCleskey v. Zant*. The 1996 Act merely refines the restrictions placed on successive petitions. To find at this juncture that such restrictions violate the Suspension Clause would require this Court to disregard completely its own considerable precedent.

Nothing in the traditions of habeas corpus justifies the conclusion that Petitioner has suffered from a violation of the Suspension Clause since he has already been provided extensive collateral review in the federal courts and because he has no constitutional entitlement to a second federal habeas corpus review. No provision of the Constitution compels perpetual review to avoid a suspension of the writ.

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[5] *See, e.g., McCleskey v. Zant*, 499 U.S. at 485; *Kuhlmann v. Wilson*, 477 U.S. at 470.

CONCLUSION

This Court should dismiss this petition for a writ of certiorari as having been improvidently granted, because this Court lacks jurisdiction under Section 106 of the Act of 1996 to enertain a petition for a writ of certiorari seeking review of the decision of the Eleventh Circuit Court of Appeals. Alternatively, Respondent prays that this Court deny the petition for a writ of certiorari and vacate the stay of execution.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

SUSAN V. BOLEYN
Senior Assistant Attorney General

PAULA K. SMITH
Senior Assistant Attorney General

PAIGE REESE WHITAKER
Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
State Law Department
40 Capitol Square
Atlanta, Georgia 30334-1300
(404) 656-3397